IF THE LINES OF A JUNIOR LODE LOCATION BE LAID ACROSS THE SURFACE OF A VALID SENIOR LOCATION, WILL THE JUNIOR LOCATION ACQUIRE EXTRALATERAL RIGHTS BASED ON A PORTION OF THE VEIN WHICH IS INCLUDED WITHIN THE SENIOR LOCATION, AS AGAINST ANOTHER EARLIER LOCATION COVERING THE DIP OF THE VEIN?

I. WHEN THE SENIOR LOCATION IS UNPATENTED AT THE TIME THE JUNIOR LOCATION IS MADE.

IT WAS decided in *Del. Monte M. & M. Co.* v. *Last Chance M. & M. Co.*,[1] that the lines of a junior lode location may be laid upon the surface of a valid senior location (if done openly and peaceably), for the purpose of securing extralateral rights on the dip of a vein the apex of which is within the second and outside of the first. But the court declined to decide whether the junior locator would acquire any extralateral rights based upon a portion of the apex covered by the senior location, saying:[2]

"Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance (the junior) to pursue the vein as it dips into the earth westwardly * * * and to appropriate as much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration."

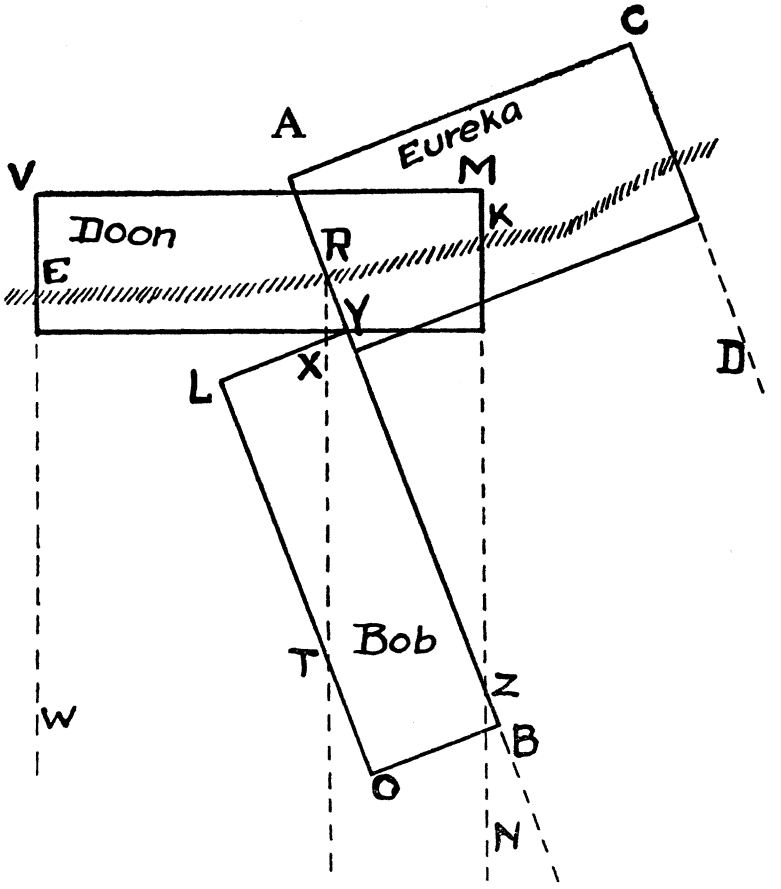
The diagram on the following page presents the question clearly:

The Bob claim was located in 1880; the Eureka in 1885, and the Doon in 1890. The Bob was patented prior to the location of the other claims; the Eureka and Doon are unpatented. The lines of the Doon claim were laid across the surface of the Eureka with the consent of the owner of the latter. Obviously the Eureka is entitled to full extralateral rights, i. e., between the line A-B and the line C-D. The Doon, in accordance with the Del Monte case, is entitled to extralateral rights between the line R-T and the line V-W. But would it also be entitled to extralateral rights between the line R-T

[1] 171 U. S. 55.
[2] Pp. 85-86.

and the line Z-N, as against the Bob claim? That question was left undecided in the *Del Monte* case. We shall endeavor to answer it.

If we keep in mind that the portion of the vein in controversy is beneath the surface of the Bob claim, which is prior in date to the others and is patented, it would seem that a correct solution of the



problem now under discussion would depend upon whether the owner of the junior claim, by laying his lines in part upon the surface of a senior claim, so as to include a portion of the apex within the senior claim, acquires any *estate,* either present or contingent, in that portion of the apex found within the senior claim.

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[3] 207 U. S. 1.

The Supreme Court in the *Lawson* case,[3] said:

"Title by patent from the United States to a tract of ground, theretofore public, *prima facie* carries ownership of all beneath the surface, and possession under such patent of the surface is presumptively possession of all beneath the surface. This is the general law of real estate. True, in respect to mining property, this presumption of title to mineral beneath the surface may be overthrown by proof that such mineral is a part of a vein apexing in a claim belonging to some other party. But this is a matter of defense; *and while proof of ownership of the apex may be proof of the ownership of the vein descending on its dip below the surface of property belonging to another, yet such ownership of the apex must first be established before any extralateral title to the vein can be recognized.* This suit was not in the nature of an ejectment, to put the defendant out of possession of the space beneath the surface of plaintiff's claims from which they had extracted ore, but to quiet the title of the plaintiff to the vein in which they had been working, and to restrain them from mining and removing any more ore."

And again:—"They (the apex claimants) must show that the ore was taken from a vein *belonging to them.* Was there a vein? Where was its apex, and *who was the owner of that apex?*"[4]

Referring to the diagram on page 199 it will be observed that the Bob claim has no part of the apex of the vein; but it is the owner of all ore beneath its surface until some one can show a higher right based on *ownership* of the apex and its location in such a manner as to cover the vein beneath the Bob claim. The owner of the Doon claim owns the apex E-R and therefore owns that portion of the vein beneath the Bob claim covered by the triangular surface L-X-T. But does the owner of the Doon *own* any interest in the portion of the apex R-K? If he does not, he has nothing upon which to base a title to the vein beneath the surface of that portion of the Bob between the letters X-Y-Z-N-O-T.

The case of *Belk* v. *Meagher*,[5] was decided in 1881 and from that time until 1898, when the *Del Monte* case was decided, the courts uniformly held to the letter of the decision in the *Belk* case, viz:[6]

"A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator,

[4] See also Iron Silver M. Co. v. Elgin M. & S. Co., 118 U. S. 196; St. Louis Co. v. Montana Co., 194 U. S. 235.

[5] 104 U. S. 279.

[6] 104 U. S. 279 at p. 284.

but all the world, because the law allows no such thing to be done."

As Mr. LINDLEY in the first edition of his work on MINES[7] put it: "Two locations cannot legally occupy the same place at the same time."

This rule was applied whether the junior discovery was made within or without the lines of the senior claim.[8]

But the decision in the *Del Monte* case changed the opinion of many members of the bar. While that case merely held that the junior locator could place his lines across the surface of a senior location for the mere purpose of securing parallelism of end-lines and for the purpose of appropriating any surface not included within the senior's lines, and while the Supreme Court expressly disclaimed any intent to decide that the junior claim would acquire any estate, either present or contingent, in the land embraced within the senior's lines, it was contended nevertheless by many that the logic of that decision would justify the conclusion that the junior would acquire certain residuary rights to use the apex within the senior location. In other words, it was contended that the very question which the *Del Monte* decision expressly left unanswered, was in fact answered by the logic of that decision.

Thus Mr. COSTIGAN in his MINING LAW,[9] says that the "judicial apex doctrine" seems to be a logical extension of the principles announced in that (the *Del Monte*) decision."

Mr. LINDLEY in his second edition[10] likewise expressed his belief that the *Del Monte* case required a modification of the conclusions stated in his first edition.

The Circuit Court of Appeals for the Ninth Circuit, in *Bunker Hill, etc. Co.* v. *Empire State, etc. Co.*,[11] likewise interpreted the *Del Monte* case as justifying the granting of extralateral rights based upon a portion of apex which presumably belonged to an older location, as against *junior* locators upon the dip or upon other portions of the apex.

Mr. ARNOLD pointed out several years ago in a discussion of this subject:[12]

"The exact holding of the Court in the *Del Monte* case, and the doctrine for which that case has been cited as authority, are two propositions of entirely different natures. The first merely affords a means of acquiring extralateral rights where otherwise there

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[7] Lindley on Mines, (ed. 1) § 363.
[8] Oscamp v. Crystal River Co., 58 Fed. 295.
[9] Costigan on Mining Law, p. 435.
[10] Lindley on Mines (ed. 2) § 363.
[11] 109 Fed. 538, 131 Fed. 591, (the first Stemwinder case).
[12] 22 Harv. L. Rev. 288.

would be none, based on ownership of a previously unlocated part of an apex; the second seeks to give double extralateral rights or extralateral rights in two different directions from one and the same part of an apex. If it be granted that the right to pursue a vein on its dip must always be predicated on ownership of an apex, how can a right on the dip of a vein be granted to one who does not own a corresponding part of the apex? Would not this be to violate the elementary rule that a locator can have no more of the dip than he has of the apex?"

But while the decision in the *Del Monte* case did not decide the question under discussion, and we believe did not justify the conclusion which has been drawn from it, we must admit that some support was given by the case of *Lavagnino* v. *Uhlig*[13] to the contention that a junior locator is entitled to use for extralateral right purposes a portion of an apex which he does not own.

Indeed Mr. COSTIGAN[14] says that "the ultimate justification of the judicial apex doctrine must of course rest on the foundation furnished by the of *Lavagnino* v. *Uhlig*."

That case decided that a junior locator whose lines were laid across the surface of a senior valid location acquired such an eventual right to the area in conflict as against third persons that upon abandonment or forfeiture of the senior location the junior became the owner of the territory in dispute, and that it did not revert to the public domain. In other words, the Supreme Court held distinctly that the junior locator acquired certain contingent rights to the ground embraced within the senior valid claim. In so deciding, the Supreme Court ignored its own decision in *Belk* v. *Meagher*,[15] and the numerous federal and state decisions which followed that precedent.

If the *Lavagnino* case stated the law correctly, we should probably be compelled to admit that the Doon claim would be entitled to extralateral rights based on the portion of the apex R-K as against the Bob claim. But the *Lavagnino* case is no longer good law.

Shortly after that case was decided the same question came before the various state courts in the mining states. Some of those courts meekly followed the *Lavagnino* case; others followed it under protest, and a third class of courts absolutely refused to follow it. In this latter class is found the Supreme Court of Nevada, which court in *Nash* v. *McNamara*,[16] took issue with the Supreme Court

[13] 198 U. S. 443 (1905).
[14] Costigan on Mining Law, p. 436.
[15] 104 U. S. 279.
[16] 30 Nev. 114, 93 Pac. 405.

of the United States and pointed out that not only had the Supreme Court ignored an unbroken line of its own decisions but had also ignored numerous decisions in the state and federal courts in the mining states from the Mexican border to the Canadian line, which without exception had supported the earlier decisions of the Supreme Court of the United States.

In 1907 the question was again presented to the United States Supreme Court in *Farrell* v. *Lockhart,*[17] and its attention was called to the decisions by the Nevada Supreme Court and other courts. The Supreme Court gracefully overruled the *Lavagnino* case and decided that the case of *Belk* v. *Meagher* should be followed.

In *Swanson* v. *Sears,*[18] the court was urged to return to the rule announced in *Lavagnino* v. *Uhlig,* but the court refused, and said:

"The argument for plaintiff is a vain attempt to reopen what has been established by the decisions. *A location and discovery on land withdrawn quoad hoc from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right.* * * * This doctrine was not qualified in its proper meaning by *Del Monte Mining and Milling Co.* v. *Last Chance Co.,* 171 U. S. 55, for that case attributed effect to the overlapping location only for the purpose of securing extralateral rights on the dip of a vein the *apex of which was within the second and outside of the first,*—rights consistent with all those acquired by the first location. * * * The principle of *Belk* v. *Meagher* was reaffirmed. * * * It is true that there is reasoning to the contrary in *Lavagnino* v. *Uhlig,* * * * but in *Farrell* v. *Lockhart* * * * that language was qualified and the older precedents recognized as in full force. We deem it unnecessary to consider the distinction attempted by the plaintiff between location and relocation, voidable and void claims, etc., *as the very foundation of his right, the offer and permission of the United States,* under Rev. Stats., § 2322, *was wanting when he did the acts intended to erect it.* His entry was a trespass, his claim was void, and the defendant's forfeiture did him no good."

We believe that the foregoing review of the decisions of the Supreme Court shows conclusively that *ownership* of the apex is essential to the acquisition of extralateral rights; that the mere placing of the lines of a junior location over the surface of a prior valid location does not give the junior locator any estate in that part of the apex within the senior's claim; and therefore the junior locator is not entitled to extralateral rights based upon any part of the apex which is within the senior claim.

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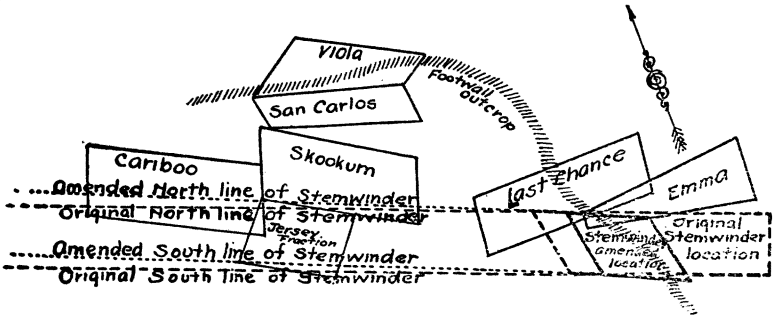
[17] 210 U. S. 143.
[18] 224 U. S. 180.

It has been contended that some courts in the mining states have recognized the "judicial apex doctrine." Among cases most frequently cited upon this subject, are what are known as the *Stemwinder* cases, decided by the United States Circuit Court of Appeals for the Ninth Circuit.[19] The following diagram shows the relative position of the claims involved in those cases.



The Emma claim was admitted to be prior in date of location to the Stemwinder, and the trial court found that the Stemwinder was older than the Last Chance.

In the first of the *Stemwinder* cases the owner of the Stemwinder sought to acquire extralateral rights between its side-end-lines extended westerly as against the Last Chance claim, less the extralateral rights of the Emma. The United States Circuit Court of Appeals held that the failure of the owner of the Stemwinder claim to file an adverse claim against the application of the Last Chance for patent amounted to a conclusive admission that the Last Chance claim was prior in date, notwithstanding that it was in fact subsequent in date. The court, therefore, held that as between the Stemwinder and the Last Chance claims the Stemwinder had no extralateral rights. The court, however, discussed the question whether the Stemwinder would have had extralateral rights, in view of its priority, against the Last Chance had it not lost such rights by failure to file an adverse claim, and the court, applying a principle which it believed to be a logical extension of the *Del Monte* case, expressed the opinion that the Stemwinder would have had such extralateral rights, notwithstanding the fact that its north line was placed across the surface of the prior Emma claim. But the court expressly stated that such extralateral rights would only be good as against other *junior* claims.

After the decision in the first *Stemwinder* case the owner of the Stemwinder commenced another suit asserting a right to all of the

[19] 109 Fed. 538; 121 Fed. 973; 131 Fed. 591.

vein between its end-lines extended westerly, after deducting the extralateral rights of the Last Chance and Emma. An injunction was granted to the owner of the Stemwinder and an appeal was taken from this order but the Circuit Court of Appeals affirmed the action of the trial court in granting the injunction.[20] Thereupon the case was tried on its merits. It was admitted at the trial that at the time the Stemwinder was located, its north line was placed upon the surface of the Emma claim.

Subsequently the Stemwinder lines were amended so that its legal end-lines had a course in a more northerly direction than had its original lines. After the location of the Stemwinder and prior to its amendment, the Skookum, Cariboo and Jersey Fraction claims, owned by defendant, were located so as to cover a portion of the dip of the vein within the end-line planes of the Stemwinder. Neither the Skookum, Cariboo, nor Jersey Fraction contained any portion of the apex. The Circuit Court of Appeals decided the case in favor of the Stemwinder and expressly held that as against *junior* locations upon the dip the extralateral rights of the Stemwinder claim might be predicted in part upon a portion of the apex which was within the lines of and belonged to the prior Emma claim. But the court in affirming the decree quoted that part of it which awarded to the Skookum, Cariboo, and Jersey claims, so much of the vein beneath their respective surfaces as was included between the original end-line planes of the Stemwinder and planes drawn through the amended lines of that claim. In view of the fact that the Cariboo and other claims contained no part of the apex there would have been no reason to deny the Stemwinder the right to take the vein to its amended north line extended, as against those claims, had such amended north line not been laid across the prior Emma claim; because it is elementary that a junior apex location covering only unappropriated public land is entitled to dip rights as against a senior location covering the dip but containing no part of the apex.

From a careful reading of the decision in that case, it will appear that the court did sanction the right of a junior locator to acquire extralateral rights based upon a portion of the apex which it did not own; but all that the court held was that such extralateral rights would be good against the United States and *subsequent* locators upon other portions of the apex *or upon the dip;* but prior locators upon the dip would have a right to the dip superior to one who included within his lines an apex belonging to another, to the extent of such inclusion.

[20] 121 Fed. 973.

Applying the decision in the *Stemwinder* case to the question which we are now discussing, it must be concluded that the Doon claim would not have extralateral rights based on that portion of the apex included within the Eureka claim as against the prior Bob claim located upon the dip, because the Bob claim occupies the same position that the Skookum, Cariboo and Jersey Fraction occupied with reference to that portion of the dip of the vein between the original and the amended north Stemwinder end-line extended in its own direction.

In the case of *Stenfjeld* v. *Espe*,[21] decided in 1909, the Circuit Court of Appeals for the Ninth Circuit again discussed the meaning of the *Del Monte* case and held that that decision, "sustained the right to so invade land already located *for the mere purpose of location.*" Again in *Becker* v. *Long*[22] the same court discussed the meaning and effect of the decision of the Supreme Court in *Swanson* v. *Sears*,[23] saying:

"It will not be necessary to review the number of cases in this and other courts where priority of location and discovery have been subjects of controversy with respect to overlapping areas in mining claims. We think the controversy in the present case is disposed of by the decision of the Supreme Court of the United States in the late case of *Swanson* v. *Sears*." After stating the facts in that case and quoting from the decision, the Circuit Court of Appeals says, "The decision of the Supreme Court of the United States in *Swanson* v. *Sears* broadly covers the whole question of location and discovery upon ground within a prior valid and subsisting location, and determines that such a location is absolutely void, whether the discovery in the junior location is within or without the overlapping area."

We have been unable to find a single case which upholds the right of the owner of an overlapping apex claim to predicate extralateral rights upon a portion of a vein which he does not own and thereby to defeat the presumptive title of the owner of a senior patented claim covering the dip. The Supreme Court of the United States in the *Del Monte* case, without deciding the question, intimated that *ownership* of the apex was essential to its use for extralateral right purposes; the same court in the *Lawson* case held distinctly that ownership of the apex must be first proved before any extralateral rights could be secured; that court in *Farrell* v. *Lockhart* and *Swanson* v. *Sears* expressly held that a junior locator by laying his lines

[21] 171 Fed. 826.
[22] 196 Fed. 721.
[23] 224 U. S. 180.

over the surface of a valid senior location, does not acquire any present or eventual title to the ground in conflict. Even the *Stemwinder* decisions protected a senior location covering the dip, against a junior location covering an apex belonging to a prior location.

The only real foundation which the "judicial apex doctrine" has ever had was the principle announced in the decision of *Lavagnino* v. *Uhlig;* that decision was overruled; the foundation of the doctrine was therefore destroyed.

II. WHEN THE SENIOR CLAIM IS PATENTED AT THE TIME THE JUNIOR LOCATION IS MADE.

We have heretofore assumed for the purpose of discussion that the Eureka claim was unpatented at the time the Doon location was located; let us now suppose that the Eureka claim had been patented prior to the location of the Doon claim. Would the Doon, by extending its lines over a portion of the Eureka, acquire any extralateral rights based on that portion of the apex within the Eureka lines as against the Bob claim? The argument which has been presented against the allowance of extralateral rights upon the assumption that the Eureka was unpatented, applies with equal, if not greater force, if we assume that the Eureka was patented before the location of the Doon.

While the Supreme Court of the United States has not so decided, it has been held by the Land Office that the lines of the junior claim may be extended across the surface of a patented senior claim, provided it be done openly and peaceably. In other words, the rule with reference to making the location is held by the Land Office to be the same whether the invaded claim be patented or unpatented. Without questioning this doctrine, it does not follow that because the junior locator may extend his lines upon the surface of a senior claim, that the junior thereby becomes entitled to use the apex within the senior for extralateral right purposes.

The only cases which we regard as being in point on this subject deny that any right to use the apex within the senior patented claim is acquired by the junior if he extends his lines across the surface of the senior claim.

The case of *State* v. *District Court*[24] presented such a question. There a junior locator made a discovery of a vein within a small fraction of ground lying between several patented claims; using this discovery as a basis, he extended the lines of his claim across the surface of several patented claims. The end-lines of the patented claims over which the junior locator extended his lines, pointed in such directions that the claims so located upon the apex did not

[24] 25 Mont. 504, 65 Pac. 1020.

cover all of the vein on its dip, but the latter was covered by other patented claims which contained no part of the apex of that vein. The junior locator asserted extralateral rights not only to that portion of the apex within the free ground embraced within his claim, but also claimed rights based on that portion of the apex within his exterior lines which was also within the prior patented claim of his neighbor. The Supreme Court of Montana, after stating the facts, commented on the *Del Monte* case, and said: "Nowhere in the opinion do we find any support for the contention that the junior locator acquires any right to any portion of the vein beneath the surface of the senior location by laying his lines upon, over or across his surface, except that by this means he may secure parallelism of his end-lines, and through this parallelism extralateral rights to the extent of the length of the vein found within the surface for which he may receive patent. We doubt seriously whether the court intended to be understood as declaring it to be the law that a junior locator may lay his lines in part or wholly upon and over the surface of claims already patented and secure any rights thereby. * * * So long as land is not patented the legal title is still in the government; and it might be argued with some force that while held under a location merely, it is still within the jurisdiction of the Land Department and for that reason it is within the province of its authority to say that the junior locator may lawfully go upon it and mark his boundaries and erect his monuments upon its surface in order to initiate rights in lands not covered by it." The court held that the junior locator had no extralateral rights excepting such as he was entitled to by virtue of the apex within his free ground.

In *McElligott* v. *Krogh*[25] a locator of a mining claim made a discovery on public land, but extended one end of his claim over and upon a Mexican grant and the other upon patented agricultural land. The Supreme Court of California held that such location was valid to the extent that the land when located was public land and the extralateral rights were limited to the apex within such free ground.

An interesting case arose in Nevada which is not directly in point but which is suggestive. The case is entitled *Round Mountain Mining Co.* v. *Round Mountain Sphinx Co.*[26] The Mining company owned certain unpatented mining claims known as Sunnysides No. 1, 2, and 3. Apparenty for the purpose of securing double extralateral rights on the vein within those claims that company caused to be located almost entirely within the limits of the three claims

[25] 151 Calif. 126, 90 Pac. 823.
[26] — Nev. —, 129 Pac. 308.

another claim called the Lost Gazabo, the discovery of the latter being within the limits of the former claims. The end-lines of the Lost Gazabo pointed in a northerly direction, while the end-lines of the Sunnyside claims pointed in a northeasterly direction. A single patent was issued to the Mining Company for the three Sunnyside claims and the Lost Gazabo, without determining the relative rights of the respective claims. The Mining Company brought suit against the Sphinx Company, claiming extralateral rights based upon the Lost Gazabo claim. The Sphinx Company contended that, notwithstanding the issuance of patent for the Lost Gazabo, the claim was void, having been located within the limits of prior claims. The Supreme Court of Nevada so held and denied the Mining Company extralateral rights.

The question embraced in the title should be answered in the negative.

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